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IN THE

Supreme Court of the United States

October Term, 1965

No. 882

THOMAS E. ENGLAND,

Petitioner,

vs.

AUTOMATIC CANTEEN COMPANY OF AMERICA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

When a suit is dismissed with prejudice, does the defense of *res judicata* bar a subsequent suit when such subsequent suit has as its basis (1) the same cause of action as was pleaded in the prior suit, and (2) additional evidentiary allegations which could have been pleaded in the prior suit and which, if proven, would have been evidence tending to establish the alleged cause of action in such prior suit?

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit, reported at 349 Fed. 2d 988, which held that the cause of action asserted in Petitioner's complaint was barred by the *res judicata* effect of the dismissal with prejudice of

two cases by the District Court for the Northern District of Illinois. The two Chicago cases were *N. Y. Automatic Canteen Corp. et. al., v. Automatic Canteen Company of America, et al.,* (Case No. 46 C 2018) and *Automatic Canteen Co. of Cleveland, et al., v. Automatic Canteen Co. of America, et al.,* (Case No. 46 C 2020).

The essence of the Chicago cause of action was that, by various means, the plaintiffs therein (including Petitioner) were allegedly wrongfully foreclosed from purchasing supplies of candy, gum and nuts directly from the manufacturers of such confections for resale through vending machines. It was alleged that a requirements contract for confections existed between plaintiffs and Automatic. Also alleged was a conspiracy between Automatic, Swan (a wholly owned subsidiary of Automatic), and the confection manufacturers, which conspiracy had as its purpose enabling Automatic to monopolize the sale of confections to plaintiffs and preventing plaintiffs from purchasing confections directly from the manufacturers. Other allegations were that Automatic, in furtherance of its attempt to monopolize sales of confections to plaintiffs, unilaterally took certain coercive steps against plaintiffs to prevent them from buying directly from the manufacturers.

The Chicago cases were dismissed with prejudice on April 5, 1949. The instant suit was commenced March 29, 1949, six days prior to the dismissal of the Chicago cases. The allegations of the complaint are divided into six counts. Counts I and II allege the conspiracy between Respondent and the manufacturers to prevent Petitioner from making direct purchases of confections from the manufacturers. Counts III, IV and VI allege that Respondent unilaterally took certain steps to prevent Petitioner from making such direct purchases. Count V alleges that an unlawful contract (the same contract pleaded in the Chicago cases) between

Petitioner and Respondent prevented Petitioner from making such direct purchases. In short, it is manifest that the gravamen of each count of Petitioner's complaint, the alleged wrong he suffered, is that he was cut off from the manufacturers as a source of supply for the confections to be sold in his business.

The District Court, after comparing the Chicago cases to the complaint in this case, held:

> "The Court has examined the allegations contained in the complaints of the Chicago cases and those in the complaint of the instant case and finds that the instant case is barred under the doctrine of res judicata."

Affirming, the Court of Appeals for the Sixth Circuit held:

> "An examination of the court files shows that the same matters were set forth in the complaints in the Chicago case and the present case; and that all matters complained of in the present case were alleged to have occurred at a time prior to the dismissal of the Chicago cases in 1949, no post 1949 events being charged in the pleadings in the present case."

SUMMARY OF ARGUMENT

This case involves no unique or substantial question under the antitrust laws or under the Federal Rules of Civil Procedure. On the contrary, all that is involved is the application of certain rudimentary principles of the law of *res judicata* to the factual situation as found by the courts below. The District Court and the Court of Appeals made the factual determination of the identity of the cause of action pleaded in the Chicago cases and the cause of action alleged in this case and then simply applied these rudimentary principles.

Petitioner cannot and has not attempted to attack this factual finding except to assert in conclusory terms that

the Chicago cases involved a cause of action different from the present case. This assertion, being a mere conclusion and unaccompanied by an analysis of the relevant facts, does not meet the Court of Appeals' finding. Clearly certiorari should not be granted to examine this factual finding of the courts below, a finding, however, which we will later point out was correctly made.

As noted, the legal principles involved in the case are very simple. A dismissal with prejudice has the same *res judicata* effect as a judgment after trial. Such a dismissal will accordingly bar a subsequent suit which has as its basis the same cause of action pleaded in the prior suit. It likewise bars a subsequent suit which attempts to raise issues which could have been included as part of the cause of action pleaded in the prior suit; that is, a party may not "split" his cause of action. The District Court and the Court of Appeals, having found as a matter of fact that "the same matters were set forth in the Chicago case and the present case", properly applied the foregoing *res judicata* principles. There is, therefore, no legal principle involved warranting review by this Court.

ARGUMENT

I

The Court of Appeals Correctly Applied Elementary Rules of Res Judicata in this Case.

"Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action." *Restatement, Judgments,* Sec. 48 (1942). A dismissal "with prejudice", being a judgment "on the merits" bars a later suit on the same cause of action. *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 99 L. Ed. 1122, 75 Sup. Ct. 865 (1955); *Olsen v. Muskegon Piston Ring Co.,* 117 F. 2d 163 (C.A. 6th, 1941); *Smoot v. Fox,* 340 F. 2d 301 (C. A. 6th, 1964).

The rule that a dismissal with prejudice bars a subsequent suit on the same cause of action encompasses also the rule that a final judgment on the merits, whether a dismissal or judgment after trial, bars a subsequent suit having as its basis matters which *could* have been pleaded as part of the original claim. *United States v. Parker,* 120 U.S. 89, 30 L. Ed. 601, 7 Sup. Ct. 454 (1887); *Angel v. Bullington,* 330 U.S. 183, 91 L. Ed. 832, 67 Sup. Ct. 657 (1947); *Grubb v. Public Utilities Commission,* 281 U.S. 470, 74 L. Ed. 972, 50 Sup. Ct. 374 (1930); *Cleveland v. Higgins,* 148 F. 2d 722 (C.A. 2d, 1945), *cert. denied* 326 U.S. 722 (1945); *White v. Sinclair Prairie Oil Co.,* 139 F. 2d 103 (C.A. 10th, 1943). In the *White* case, *supra,* (involving a dismissal), the Court indicated the reasons for this rule, as follows (139 F. 2d at 107):

> "A party seeking to enforce a cause of action must present to the court, either by pleading or proof, or both, all the grounds upon which such cause of action is predicated. He is not at liberty to split up his demand and prosecute it by piecemeal or to present a

> part of the grounds upon which such cause of action is founded and leave the rest to be presented in a subsequent suit if the first fails."

Justice Frankfurter, in *Angel v. Bullington, supra,* stated the rule somewhat differently but to the same effect, as follows (330 U.S. at 192):

> "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the Courts to conclusion. (Citation omitted) And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

After finding that the complaint in the instant case pleads the same cause of action as was pleaded in the Chicago cases, the Court of Appeals correctly applied the foregoing elementary rules to hold "that the dismissal of the Chicago cases with prejudice bars the present case under the doctrine of res judicata."

II

The District Court and the Court of Appeals Correctly Determined that the Cause of Action Pleaded in this Case Is the Same Cause of Action Pleaded in the Chicago Cases.

The Court of Appeals found that "An examination of the court files shows that the same matters were set forth in the complaints in the Chicago cases and the present case"; in short, that the same cause of action was pleaded in both places.

Nowhere in Petitioner's brief has he attempted to come to grips with the foregoing factual determination. In response to the findings of the District Court and the Court of Appeals, Petitioner has not, at any stage of this case, attempted to compare the Chicago cause of action with his cause of action alleged in this case. Instead, he has contented himself

with mere conclusory statements that the two cases are different. Thus the only factual distinction suggested is that the Chicago cases are characterized as involving the "Swan Candy conspiracy" (pages 4 and 5 of Petitioner's brief), and this case, it is stated, does not involve that conspiracy. Of course, the only relevant analysis is a comparison of the allegations against *Automatic* in the Chicago cases with those of the instant case. The presence of Swan in the Chicago case is immaterial to this analysis; the issue is whether Respondent has been or could have been similarly charged in the Chicago cases and the case at bar. Petitioner has not, despite his frequent conclusory denomination of the Chicago cases as the "Swan Candy conspiracy", made this analysis. In short, Petitioner has premised his whole argument (as he must) on this case involving a cause of action different from that pleaded in Chicago, but has nowhere attempted to show how the present case involves a cause of action different from the Chicago cases. The reasons for Petitioner's evasion of this issue are clear. First, the record affirmatively demonstrates, and the District Court and the Court of Appeals found, that the cause alleged against Respondent in the Chicago cases is the same cause of action pleaded in this case. Secondly, Petitioner failed to meet this issue because to do so would be to confess that he is asking this Court to review a question of fact already twice determined against him by the District Court and the Court of Appeals.

The unrebutted factual holding of the lower courts that the same cause of action was pleaded here and in Chicago summarily disposes of many of the arguments urged by Petitioner as justifying certiorari. Thus, the concern of the Petitioner that the Court of Appeals' opinion will discourage small franchise holders from joining to prosecute a common antitrust action (Petitioner's brief, p. 7) is with-

out foundation. Multiple plaintiffs will not be forced to join separate and unrelated causes of action; on the contrary, the result is that such plaintiffs may not reassert in a subsequent case the *same* cause of action after a disposition of the multiplaintiff claim on the merits. Surely even the most "cautious" (Petitioner's brief, p. 8) application of *res judicata* will admit of no other result. The Court of Appeals is not "playing into the hands of the wealthier party" (Id.) when it follows the rule that a defendant may not be harrassed by a second suit on the same cause of action.

Likewise, the Court of Appeals by its decision here has not created "chaotic conditions" in antitrust cases (Petitioner's brief, p. 7) by requiring unrelated claims to be pleaded in a multiplaintiff suit on pain of being barred subsequently. To reiterate, only the same cause may not be subsequently pleaded. As for the contention that an inconvenient forum is afforded Petitioner (Petitioner's brief, p. 8), Petitioner has cited no authority for his proposition that a plaintiff can reassert a cause of action already disposed of on the merits because he chose an inconvenient forum the first time he brought the cause.

The argument (Petitioner's brief, p. 11) based on Rule 18 of the Federal Rules of Civil Procedure is grounded upon Petitioner's assumed premise that he had more than one cause of action. Petitioner says Rule 18 does not require him to allege separate and distinct causes of action in one suit. We agree. But there is no novel doctrine in the holding that Petitioner may not dismiss a cause of action with prejudice and then reassert that cause in a subsequent suit. If the Court of Appeals had held to the contrary, then the "uniformity" (Petitioner's brief, p. 11) required in the administration of the antitrust laws—indeed, the uniformity required in the administration of all the law—would be destroyed. The Court of Appeals correctly applied one of the

most universal of rules. *Restatement, Judgments,* Sec. 48 (1942). Petitioner's brief is not persuasive that that rule should at this date be overruled.

While the foregoing disposes adequately of most of the points raised by Petitioner, we believe that further analysis of the complaint in this case would be helpful to the Court.

As noted earlier, the complaint is divided into six counts. Counts I and II allege that Respondent conspired with candy and gum manufacturers to prevent Petitioner from making purchases directly from the manufacturers, and that Petitioner was damaged thereby. The identical conspiracy having the same object was pleaded in Chicago Case No. 46 C 2018, the only difference being that Swan Candy Co. was there included as a defendant and omitted in the instant case. It therefore affirmatively appears that Counts I and II involve the same cause of action involved in the Chicago cases. The absence of Swan in this case is, of course, irrelevant; obviously, Petitioner cannot create a different conspiracy merely by omitting one of the alleged co-conspirators. See *Williamson v. Columbia Gas and Electric Corp.,* 186 F. 2d 464 (C.A. 3d, 1950), *cert. denied* 341 U.S. 921 (1951). The same cause of action being involved, *res judicata* applies. *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 99 L. Ed. 1122, 75 Sup. Ct. 865 (1955).

Count V alleges that the contracts between Petitioner and Respondent were in volation of Section 3 of the Clayton Act (as tie-in sales) and that they prevented Petitioner from purchasing candy, gum, and nuts directly from manufacturers to his damage. These contracts were the same contracts involved in the Chicago cases.

As noted earlier, the Chicago cases were premised upon defendants' actions which allegedly foreclosed the plaintiffs there from making purchases directly from manufacturers. The allegedly illegal contracts were part and parcel of this

course of conduct. Petitioner there had his opportunity to argue that the contracts were prohibited tie-in arrangements; when he failed so to do, he split his cause of action and is now barred by *res judicata* from raising the issue. *Angel v. Bullington, supra.*

The Court, in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 71 L. Ed. 1069, 47 Sup. Ct. 600 (1927) said (bracketed material is our interpolation of the facts in this case) at p. 321:

> "A cause of action does not consist of facts, but of the unlawful violation of a right [the "right" to purchase directly from manufacturers] which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong [Respondent's preventing Petitioner from purchasing directly from manufacturers]. The mere multiplication of grounds [adding the Clayton Act allegation to the Sherman Act charge] of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The *thing,* therefore, which in contemplation of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*' " (Emphasis by the Court).

See also *F. L. Mendez & Co. v. General Motors Corp.,* 161 F. 2d 695 (C.A. 7th, 1947), which is directly in point. Plaintiff had alleged in an earlier case that defendant had wrongfully cancelled its franchise pursuant to a Sherman Act conspiracy. After a verdict for defendant, plaintiff commenced a second action alleging the franchise had been wrongfully cancelled in violation of the Clayton Act. The Court held that the allegation of the violation of the Clayton Act did not create a new cause of action. The injury—the wrong—was the same, and plaintiff should have pleaded

all his grounds for recovery in the first action. So also here. Petitioner suffered one alleged wrong, the foreclosure from purchasing directly from the manufacturers. The introduction of the Clayton Act as a new *ground* for recovery, neither creates a new "wrong" to Petitioner, nor a new cause of action.

Counts III, IV, and VI allege that Respondent took certain unilateral steps designed to coerce Petitioner to cease purchasing confections directly from manufacturers. Involved are alleged refusals to offer Petitioner a new, more desirable franchise agreement (Count III), refusal to approve the sale of Petitioner's franchise (Count IV), and refusal to deliver to Petitioner a new and larger vending machine which Respondent had developed (Count VI).

Plaintiffs pleaded in the Chicago cases instances of unilateral acts by Respondent designed to coerce the franchise holders to cease purchasing directly from the manufacturers. In Case No. 46 C 2020, the refusal of Respondent to offer the new, more desirable franchise agreement was specifically pleaded. Other instances of this type of coercion are also pleaded. However, whether or not such matters are pleaded specifically, the cause of action in the Chicago cases was for the alleged cutting off of the franchise holders from making purchases of confections on the open market. The specific instances here pleaded would have formed a part of, and constituted evidence of, that alleged cause of action. As such they should have been pleaded in Chicago. To plead them in this case, however, is to split Petitioner's cause of action. This he may not do. *Angel v. Bullington, supra*; *Baltimore S. S. Co. v. Phillips, supra.*

Petitioner contends that the multiplaintiff posture of the Chicago cases prevented him from there alleging Counts III, IV, and VI, and he ought to be permitted to allege them here. The point is, however, that the issue of the various things Respondent had allegedly done to foreclose its dis-

tributors from making purchases direct from manufacturers *was already* raised by the Chicago pleadings. Although they have been elevated to the status of separate counts in this case, the instances of coercive acts taken by Respondent were embraced within the pleadings of the Chicago cases, and would have been evidence of the alleged cause of action there pleaded. "The mere multiplication of grounds * * * alleged as causing the same injury does not result in multiplying the causes of action." *Baltimore S. S. Co. v. Phillips, supra.* Plaintiff indeed has multiplied his grounds, but his alleged injury has remained the same.

Moreover, in both of the Chicago cases the complaint had been dismissed as to all the plaintiffs except Petitioner by November 23, 1948. Thus from that date to the date of dismissal of Petitioner's case, April 5, 1949, nearly five months, Petitioner had ample opportunity to bring before the Court any matters which formerly might have unduly complicated the complaint therein. Under Rule 15 of the Federal Rules of Civil Procedure, Petitioner could have moved to amend his complaint or to file a supplemental complaint. Petitioner was no longer bothered by the presence of other parties. Instead, he chose to dismiss with prejudice. He must now abide the consequences.

Petitioner complains of the Court of Appeals' reliance upon *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 99 L. Ed. 1122, 75 Sup. Ct. 865 (1955), and contends that the Court went beyond the holding of that case. On the contrary, the Court of Appeals applied the *Lawlor* holding precisely. In *Lawlor,* plaintiff filed a suit in 1942, alleging an antitrust conspiracy. This suit was dismisesd with prejudice in 1943. In 1949, a new suit was filed, alleging that the original conspiracy had continued after the dismissal of the first suit. The Court held that the continuation of the conspiracy after the dismissal of the earlier action con-

stituted a new cause of action and was not barred by *res judicata*. The Court also found the converse to be true and held that the conspiracy was foreclosed for the period of time antedating the dismissal because it constituted the same cause of action earlier dismissed with prejudice. Petitioner attempts to denigrate this Court's holding in *Lawlor* and argues that only the conspiracy antedating the filing of the first complaint is barred. However, the Court was quite precise in *Lawlor*, on three different occasions specifying that only the post 1943 acts constituted a new cause of action. Thus, at 349 U.S. 325:

> "Petitioners seek damages for resulting injuries suffered from August 16, 1943 — in other words, for a period beginning several months after the dismissal of the 1942 complaint."

And at page 328:

> "The conduct presently complained of was all subsequent to the 1943 judgment."

From the same page:

> "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist * * *."

Since the heart of the instant case, as in *Lawlor*, was an alleged conspiracy between Respondent and the manufacturers, since the same conspiracy was pleaded in the Chicago cases, and since this case was filed prior to the Chicago dismissals, the Court of Appeals quite naturally points out in its opinion that it was impossible for Petitioner to have pleaded a conspiracy in this case which continued beyond the date of the Chicago dismissals. This being the case, Petitioner may not use the *Lawlor* doctrine to urge that the continuation of the alleged conspiracy could give rise to a new cause of action (an argument made by

Petitioner in the Court of Appeals as well as here). The Court of Appeals did not, as argued by Petitioner (Petitioner's brief, pages 9 and 10), make "the existence of a cause of action dependent not upon similar facts, but only upon the date of a judgment." Instead, the Court concluded first that "the same matters were set forth in the complaints in the Chicago cases and the present case" and, then, examining the relevant dates, concluded that the alleged conspiracy, tie-ins, and other coercive acts pleaded in this case could not have arisen subsequent to the Chicago dismissals. Accordingly, there could be no new cause of action created under the *Lawlor* doctrine.

The parade of dire consequences predicted by Petitioner (Petitioner's brief, p. 10) accordingly has no basis in fact or law. Boiled down, Petitioner's argument is that the Court of Appeals' decision gives Respondent "carte blanche to engage in a multitude of harrassing activities" (Petitioner's brief, p. 10) against its franchise holders during the pendency of the franchise holders' suit against Respondent. On the contrary, Respondent has gained from the Court of Appeals' decision only that to which it is entitled under the law of *res judicata* generally and under the *Lawlor* case specifically, namely, the right not to be sued a second time upon the cause of action dismissed with prejudice in Chicago on April 5, 1949. If Petitioner had had another alleged cause of action upon which to sue Respondent, *res judicata* would not bar such a suit.

CONCLUSION

It is elementary that:

(A) a dismissal with prejudice is a judgment "on the merits" for *res judicata* purposes;

(B) a cause of action dismissed with prejudice cannot be reasserted in a subsequent suit; and

(C) the *res judicata* rule forbidding "splitting" causes of action applies to a cause dismissed with prejudice.

As Respondent has shown, and as the District Court and the Court of Appeals found, this case presents the same cause of action earlier dismissed in Chicago. Petitioner has made no real effort to attack this finding, and has limited himself to arguments based upon the assumption that he has pleaded a new cause of action here.

This case accordingly presents no important question of federal law, either substantive or procedural. Rather, it involves only the application of the foregoing rules of *res judicata*. As we have demonstrated, the Court of Appeals correctly set forth and applied these rules. It is therefore respectfully submitted that this case contains no issues warranting review by this Court.

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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